

FROM THE COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS

The committee solicits comment on the following proposal by August 15, 2006. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30104, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

The Committee on Model Civil Jury Instructions is considering the adoption of an amended instruction for use in medical malpractice cases, MCivJI 30.20.

[AMENDED] M Civ JI 30.20 Medical Malpractice: Loss of Opportunity to Survive

M Civ JI 30.20

Medical Malpractice: Loss of Opportunity to Survive or Achieve a Better Result

~~If you find that the claimed professional negligence of defendant was a proximate cause of loss of a substantial opportunity for decedent to survive, plaintiff may recover damages for the reduction in decedent's chance of survival.~~

Plaintiff cannot recover for loss of an opportunity to [survive / achieve a better result] unless the plaintiff proves that the [decedent's chance of survival / chance of receiving a better result] fell more than 50 percentage points as a result of the professional negligence.

Note on Use

~~Use this instruction only if there is a claim of loss of opportunity to survive.~~

~~This instruction should be used only if the cause of action arose before April 1, 1994. 1993 PA 78.~~

This instruction was revised by the Committee in ____ 2006 to incorporate the 1993 amendment adding MCL 600.2912a(2), and the Court of Appeals decision in *Fulton v Pontiac General Hospital*, 253 Mich App 70; 655 NW2d 569 (2002).

Comment

~~For applicability of this instruction, see *Falcon v Memorial Hospital*, reh'g denied, 437 Mich 1208 (1990), 436 Mich 443; 462 NW2d 44 (1990), which involved the loss of a 37.5 percent opportunity to survive.~~

~~Michigan does not recognize a cause of action for loss of opportunity to avoid physical harm less than death. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997).~~

Prior to the enactment of 1993 PA 78, recovery was allowed for loss of a substantial opportunity for a decedent to survive, with damages being allowed in proportion to the lost chances of survival. See *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990). M Civ JI 30.20 prior to revision was based on *Falcon*.

By recognizing loss of a substantial opportunity to survive as an injury, *Falcon* solved the problem that a plaintiff (if plaintiff's decedent had a 50 percent or less chance of survival) would be unable to show that defendant's negligence was a proximate cause of the death, applying the "more probable than not" proximate cause standard which was equated with a more than 50 percent chance.

In 1993, the Michigan legislature rejected *Falcon*, adding a new subsection (2) to MCL 600.2912a:

In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

MCL 600.2912a(2) was construed to preclude a medical malpractice action for a reduced chance of survival of a living plaintiff. *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001).

The 1993 amendment of MCL 600.2912a precludes recovery for an opportunity to achieve a better result unless the opportunity was greater than 50 percent. In a case involving alleged medical malpractice occurring in 1990 and not covered by the 1993 amendment, the Michigan Supreme Court refused to extend *Falcon* to a cause of action for loss of a 50 percent or less opportunity to avoid physical harm less than death. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997).

In *Fulton v Pontiac General Hospital*, 253 Mich App 70 (2002), the Court of Appeals held that "MCL 600.2912a(2) requires a plaintiff to show that the loss of opportunity to survive or achieve a better result exceeds fifty percent." Leave to appeal was granted in *Fulton* but that order was subsequently vacated and leave to appeal was denied. This occurred after legislation was introduced that would have substantially altered MCL 600.2912a. The proposed legislation was not enacted and the Supreme Court has since denied leave to appeal in two cases raising the issue first raised in *Fulton*. *Ensink v Mecosta County General Hospital*, 262 Mich App 518 (2004) and *Klein v Kik*, 264 Mich App 682 (2005).

History

M Civ JI 30.20 was added October 1991.

Since 1980, the Michigan Supreme Court has delegated to the Standard Jury Instructions Committee (now the Committee on Model Civil Jury Instructions) the authority to propose and adopt Standard Jury Instructions (now Model Civil Jury Instructions). MCR 2.516(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

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